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No. _____

# In the Supreme Court of the United States

October Term, 1989

LYNDA KRUSO, et al.,

*Petitioner,*

*v.*

ITT CORPORATION, et al.,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does 28 U.S.C. section 1446 violate the due process clause of the Fifth Amendment to the United States Constitution by denying a plaintiff the right to be heard before his case is removed from state to federal court?

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# In the Supreme Court of the United States

**October Term, 1989**

LYNDA KRUSO, et al.,

*Petitioner,*

*v.*

ITT CORPORATION, et al.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI

The petitioners, LYNDA KRUSO, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed after denial of rehearing on June 26, 1989. Petitioners' further petition for rehearing was denied on January 30, 1990, and Petitioners' motion for stay of the mandate of the Court of Appeals through April 30, 1990, for purposes of filing this petition, was granted on March 20, 1990.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, published at 872 F.2d 1416 (9th Cir. 1989), is attached hereto as Appendix A. The order denying Petitioners' petition for rehearing on January 30, 1990, is attached as Appendix B, and the order granting Petitioners' motion for a stay of the Court of Appeal's mandate on March 20, 1990, is attached as Appendix C.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing on January 30, 1990. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be... deprived of life, liberty, or property without due process of law....

## STATEMENT OF THE CASE

B. Summary of Procedural History.

Petitioners originally filed this action in state court in Los Angeles, California, on March 11, 1986. The day before their answer was due, on April 10, 1986, respondents, alleging diversity-of-citizenship jurisdiction, removed the case to the United States District Court for the Central District of California. 872 F.2d 1418-19.

Petitioners sought remand to the state court on the grounds that diversity-of-citizenship was lacking because defendant Thomas Green was a California resident (as were all of the plaintiffs). The District Court ruled that Green was a sham defendant, added only to defeat federal jurisdiction; consequently, it dismissed Green on its own motion and denied remand. Petitioners' motion for reconsideration was denied. Petitioners then sought an interim appeal from the denial of remand, but the District Court declined to certify the issue for appeal, and the Ninth Circuit Court of Appeals dismissed the appeal because there had been no final judgment. 872 F.2d 1419-20.

Respondents moved for summary judgment. Petitioners, still contesting the jurisdiction of the District Court to hear the case, did not oppose the motion, and it was granted. In addition, the District Court granted default judgments against some of the petitioners on respondents' counterclaims for the balances owed on their contracts. Execution on the counterclaim judgments was stayed pending appeal. 872 F.2d 1420.

Petitioners appealed to the Ninth Circuit Court of Appeals, on the sole issue of whether or not the District Court had diversity-of-citizenship jurisdiction entitling it

to proceed with the case.[1] The Court of Appeals affirmed, but on grounds not involving the District Court's jurisdiction, and neither raised nor briefed by the parties. 872 F.2d 1425-27. Petitioners' motion for rehearing was denied. Appendix B. On petitioners' motion, the Court of Appeals stayed issuance of its mandate through April 30, 1990, pending this Petition for Writ of Certiorari to the United States Supreme Court. Appendix C.

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[1]Although petitioners did not directly challenge the constitutionality of the removal procedure in either the District Court or the Court of Appeals, ". . . consideration of issues . . . not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them. [citations omitted.]" *(Vance v. Terraza*, 444 U.S. 252, 258, fn. 5, 62 L.Ed. 2d 461, 100 S.Ct. 540 (1980). Such appropriate circumstances include questions relating to federal subject-matter jurisdiction. "Although the question of the District Court's subject-matter jurisdiction was not raised in this Court or apparently in either court below, we have an obligation to consider the question *sua sponte*." [citations omitted]) (*Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607, fn. 6, 56 L.Ed.2d 570, 98 S.Ct. 2002; see also Annotation, "What Issues Will The Supreme Court Consider, Though Not, Or Not Properly, Raised By The Parties," 42 L.Ed.2d 946, 950 ["only under extraordinary circumstances will the court decline to consider matters of subject-matter jurisdiction . . ."] Questions pertaining to removal fall within the ambit of this policy. See, *e.g., Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 28 L.Ed. 462, 4 S.Ct. 510 (1884); *Grace v. American Cent. Ins. Co.*, 109 U.S. 278, 27 L.Ed. 932, 3 S.Ct. 207 (1883); *Graves v. Corbin*, 132 U.S. 571, 33 L.Ed. 462, 10 S.Ct. 196 (1890).)

## REASONS FOR GRANTING REVIEW

### I.

### THE SUPREME COURT HAS NEVER CONSIDERED THE QUESTION OF WHETHER THE REMOVAL PROCEDURE COMPLIES WITH THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS OF LAW.

Removal of a case from state to federal court is authorized by 28 U.S.C. section 1441(a). However, while that statute authorizes the right of removal, it does not set forth the procedure by which removal is to be effected. (*Ir Re Federal Sav. & Loan Ins. Corp.*, 837 F.2d 432, 435 (11th Cir. 1988).) The removal procedure is set forth in 28 U.S.C. section 1446.

While the Supreme Court decisions upholding the unconstitutionality of 28 U.S.C. section 1441(a) -- authorizing the right of removal -- are legion and "put the constitutionality of removal jurisdiction beyond question" (Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* section 3721, p. 187 (1982)), these decisions do not address the constitutionality of 28 U.S.C. section 1446, dealing with the procedure by which removal is effected.

Section 1446 was enacted in 1948 (*Id.*, section 3730, p. 498), long after virtually every Supreme Court decision

upholding the constitutionality of section 1441(a) (See cases cited in Wright, Miller & Cooper section 3721, *supra*).

Petitioners acknowledge that some of the Supreme Court decisions upholding the constitutionality of the right to removal allude to Congress' discretion to decide the procedure for removal, i.e., how, and upon what conditions removal may be effected. See *Gaines v. Fuentes*, 92 U.S. 10, 23 L.Ed. 524 (1876); *Chicago & Northwestern Ry. Co. v. Whitton*, 80 U.S. 270 (1871). But the discretion of Congress is never unfettered; it must be exercised within the limits of due process of law. (*The Mayor, Etc. v. Cooper*, 73 U.S. 247, 251, 18 L.Ed. 397 (1868), ["This court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid"].) The Supreme Court has never before addressed the question of whether 28 U.S.C. section 1446 satisfies the requirements of due process. Petitioners ask it to do so now.[2]

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[2]Pursuant to Rule 10.1(c) of the Rules of the Supreme Court, this petition presents "an important question of federal law, which has not been, but should be settled by this Court."

## II.

## THE REMOVAL PROCEDURE DENIES THE STATE COURT PLAINTIFF DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

### A. Due Process Generally Requires That a Person Have a Right to be Heard Before Being Deprived of a Significant Right.

This court has affirmed that the "two central concerns of procedural due process" are "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 at 242 (1980). In furtherance of this concern, this court has held that,

> "The fundamental requisite of due process of law is the opportunity to be heard.
>
> *Grannis v. Ordean*, 234 U.S. 385 at 394 (1914).

The timing and character of the hearing will vary with the threatened deprivation, but the hearing must be held "at a meaning time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 at 552 (1965). Except for extraordinary circumstances, this means that deprivation of a valuable right must

> "be preceded by notice and an opportunity for a hearing appropriate to the nature of the case."
>
> *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 at 313 (1950) (emphasis added).

An exception to the general rule requiring hearing to precede deprivation can be justified in a particular case where necessary to protect "a countervailing state interest of overriding significance...." *Boddie v. Connecticut*, 401 U.S. 371 at 377 (1971).

Where, however, no significant public interest is immediately threatened, see cases collected in *Goldberg v. Kelly*, 397 U.S. 254, 263, fn. 10 (1970), and the individual's "interest in avoiding... loss outweighs the governmental interest in summary adjudication," the rule requiring a hearing before action is taken must prevail. *Goldberg v. Kelly*, 397 U.S. 254 at 263, *supra*.

**B. The Right of a Plaintiff to Choose His Forum is a Significant One.**

The right of the plaintiff to choose his forum is "a valuable right of choice which should not be disturbed in the absence of strong reasons therefor." *Stevenson v. United States*, 197 F.Supp. 355 (M.D.Tenn. 1961). Thus, "unless the balance is strongly in favor of the defendant,"

it is plaintiff's choice of forum which must prevail. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 at 508 (1947).

Further, the right of citizens of a state to sue in the courts of their own state, rather than federal court, is particularly worthy of respect in our federal system:

> "The plaintiff's choice of a state forum is to be given deference and jurisdictional questions on removal are strictly construed against federal jurisdiction."
>
> *Hess v. Great Atlantic & Pacific Tea Co., Inc.*, 520 F.Supp. 373 (N.D. Ill. 1981); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).

That this right to sue in state courts where federal court may be an alternative is increasingly valued by litigants can be seen from the "rapid proliferation" of federal civil rights actions brought in state courts in recent years. Herman, "Beyond Parity," 54 Brooklyn L.R. 1057, 1058 (1989).

A right so favored by litigants, and so fully in accord with our federalism, which requires the federal courts to have "[d]ue regard for the rightful independence of state governments," necessarily evokes the fullest protection of due process of law.

**C. Due Process Requires That Plaintiffs Have a Right to be Heard Before Their Cases Are Removed From State to Federal Court.**

Since the adoption of 28 U.S.C. section 1446 in 1948, it has been possible for a defendant to remove a case from state to federal court simply by filing a petition to do so, and giving notice of it to the plaintiff.

Thus, the federal district court takes over cases at the behest of the defendant, totally ousting state jurisdiction without even the most cursory review of the petition to determine whether the requirements for removal have been met. Where those requirements have not been met, the plaintiff is relegated to a motion for remand in the very federal district court which has already taken over jurisdiction of the case on the merits.

Judged by this court's balancing test, as set out in *Goldberg v. Kelly*, 397 U.S. 254, 263, and *Boddie v. Connecticut*, 401 U.S. 371, 377, the removal procedure fails to meet the demands of due process of law: it deprives litigants of a valuable right before they have an opportunity to be heard, though there is no pressing governmental need for summary action.

It has been shown that the plaintiff's right to sue in the state court is a significant one, *prima facie* worthy of deference. *Hess v. Great Atlantic & Pacific Tea Co., Inc.*,

520 F.Supp. 373, *supra*; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, *supra*.

On the other side, the principal reason for the adoption of section 1446 in 1948 was to get rid of the conflicts between state and federal courts created by the procedure which had governed before that time.

Before 1948, the defendant had to file the removal petition in the state court, and if the state court refused to allow removal, the defendant had either to (1) litigate the case in the state court and raise the error in failing to remove on appeal, (2) ignore the state proceeding and go forward in the federal court, or (3) litigate in state and federal courts at the same time. All three of these alternatives created uncertainty for the litigants and conflict between the state and federal courts. 14A Wright, Miller and Cooper, *Federal Practice and Procedure*, section 3730, p. 499, *supra*.

But Congress could have disposed of such conflict and uncertainty simply by requiring that the petition for removal be passed on by a federal court rather than the state court in which the action had been pending.

There was no need for this purpose to go to the extreme of the current section 1446, denying the plaintiff any opportunity to object to removal until after the federal court has taken jurisdiction of the case on the merits. No "countervailing state interest of overriding

significance" justified such a departure from the traditional requirement that individuals have a right to be heard before being subjected to a governmental deprivation. *Boddie v. Connecticut*, 401 U.S. 371 at 377, *supra*; Tribe, *American Constitutional Law*, 545 (1978).

The plaintiff's right to move for remand after removal is no adequate substitute for a hearing before removal. Faced with the *fait accompli of a case that has already been removed*, plaintiff must ask for remand from a judge who has already taken jurisdiction of the merits of the case.

A judge who has already become involved in the merits of the case is a far less disinterested adjudicator of the removal issue than he would be if the considered that issue before he was seised of the merits of the case. This is a case, therefore, where hearing must come before action because, if it does not, the "governmental decision-maker" will definitely have "acquired a vested interest in ratifying an action already taken." Tribe, *Constitutional Law*, at 544, *supra*. The general rule that, "the right to notice and hearing . . . be granted at a time when the deprivation can still be prevented," *Fuentes v. Shevin*, 407 U.S. 67 at 81-82 (1972), must be applied here.

The right of the defendant to automatic removal is, as the standard treatise on the subject suggests, utterly "anomalous" in our jurisprudence. 14A Wright, Miller

and Cooper, *Federal Practice and Procedure*, section 3721, p. 186, *supra*. In no other situation does the defendant have the ability to change the forum at will, without judicial leave, and without giving the plaintiff any opportunity to object.

Thus, if a defendant wishes to change venue within the federal system, he must make a motion on which the plaintiff has an opportunity to be heard before venue is changed. Even when the district judge decides to transfer a case to another court *sua sponte*, he should give the parties an opportunity to object before the transfer is made. *Starnes v. McGuire*, 512 F.2d 918, 935 (D.C.Cir. 1974).

The same is true of state judicial systems. The Supreme Court of Delaware has rightly held that it is a violation of "fundamental due process guarantees" for a judge to grant a change of venue at the behest of one party, before the other party has an opportunity to be heard. *Eberly v. Eberly*, 489 A.2d 433 (Del.1985).

It is equally a violation of "fundamental due process guarantees" to allow a case to be tranferred from state to federal court before the plaintiff has an opportunity to be heard. Nothing could be less in accord with the due process concern for "the promotion of participation and dialogue by affected individuals in the decision-making process," *Marshall v. Jerrico, Inc.*, 446 U.S. 238 at 242,

*supra*, than a procedure such as this, which substitutes summary unilateral action for dialogue.

It is time for this court to consider the "anomaly" of a removal process which is both automatic and unilateral, and affirm that, in the federal judiciary as elsewhere, individuals cannot be deprived of significant rights "without the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385 at 394, *supra*, "at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67 at 81-82, *supra*.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. GERSTEIN
*Counsel for Petitioners*

# APPENDIX A

FEDERAL REPORTER, 2d SERIES
872 F.2d 1416 (9th Cir. 1989)

**Lynda KRUSO, Gloria Yokubaitis, Kathy E. Acquistapace, Christine M. Forakis, et al., Plaintiffs-Counterdefendants-Appellants,**

**v.**

**INTERNATIONAL TELEPHONE & TELEGRAPH CORP., ITT Commercial Finance Corp., ITT Industrial Credit Co., a corporation, ITT Business Communications,et al., Defendants-Counterplaintiffs-Appellees.**

**No. 86-6670**

United States Court of Appeals, Ninth Circuit.

Submitted March 9, 1989 *.

Decided April 19, 1989.

As Amended on Denial of Rehearing June 26, 1989.

Individuals who were shareholders, employees or customers of corporation sued finance company and others alleging fraud, intentional interference with business relationship, wrongful termination of business relationship, and breach of implied covenant of good

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

faith and fair dealing. Plaintiffs' motion to remand was denied and thereafter the action was dismissed and judgment was entered for defendants on their counterclaims, by the United States District Court for the Central District of California, J. Spencer Letts, J. Plaintiffs appealed. The Court of Appeals, Pregerson, J., held that: (1) Court of Appeals had jurisdiction to review denial of remand motion even though it was not mentioned in the notice of appeal; (2) section of the Judicial Improvements and Access to Justice Act providing that, for purposes of removal, citizenship of defendants sued under fictitious names shall be disregarded applied retroactively; and (3) plaintiffs, who were not personally involved in any of the transactions in question, lacked standing to sue, an thus non-diverse defendants were properly dismissed.

Affirmed.

---

Bruce A. Friedman, Los Angeles, Cal., for plaintiffs-counterdefendants-appellants.

Robert F. Scoular, Martin J. Foley, and Hillary Arrow Booth, Bryan, Cave, McPheeters & McRoberts,

Los Angeles, Cal., for defendants-counterplaintiffs-appellees.

Appeal from the United States District Court for the Central District of California.

**Before FLETCHER, PREGERSON and LEVY, Circuit Judges.**

**PREGERSON, Circuit Judge:**

## I. BACKGROUND

On March 11, 1986 plaintiff-appellants (hereinafter "plaintiffs") filed a complaint in state court alleging that defendant-appellees (hereinafter "defendants"), including ITT Corp., ITT Commercial Finance Corp., and individuals alleged to be their agents, had injured plaintiffs by means of fraud, intentional interference with business relationship, wrongful termination of business relationship, and breach of implied covenant of good faith and fair dealing. The complaint stemmed from a series of transactions in which International American Advertising Corporation d/b/a American Graphics (AG) and U.S. Teletypeset Corporation (TEL) (hereinafter, AG and TEL will be referred to collectively as "AG") had attempted to establish a computerized typesetting business. AG sold

"packages" of computer hardware, software, and training to "owner-operator" customers to set up their own typesetting business. Some of the customers individually applied to ITT Commercial Finance Corp. for acquisition financing. ITT Commercial Finance Corp. also provided AG with wholesale financing for acquisition of an inventory of computers for sale to prospective customers.

In their complaint, plaintiffs (owner-operators, shareholders of AG and "employees") alleged that defendants had failed to satisfy their obligation to supply plaintiffs with personal computers and financing. Plaintiffs alleged that defendants had promised to provide financing for the sale of the "package" to members of the public for a period of at least two years, and then broke this promise. Plaintiffs also alleged that defendants had made and broken a promise to provide AG with a continuous supply of ITT personal computers for at least two years. According to plaintiffs, defendants broke these promises when defendants Tom Green and Barbara Bookwalter suddenly, and without any justification, ordered all of AG's inventory removed from its warehouse and refused to provide AG with any further financing. As a result, plaintiffs allege, AG was forced

out of business and the owner-operators were left with a useless package of computer products.

Defendants describe the events leading to the lawsuit rather differently. In their version, there was no agreement between defendants and plaintiffs that financing would be available for any set period of time. According to defendants, AG promised the owner-operators to whom it sold the computer package that it would assist them in setting up their own typesetting businesses, and guaranteed to provide them with business. Defendants maintain that AG also promised to provide the owner-operators with phototypesetting services. Defendants contend that AG failed to provide the owner-operators with the business it had guaranteed, and as a result some of the owner-operators stopped paying their equipment leases with ITT Commercial Finance Corp. At the same time, say defendants, AG bounced checks to ITT Commercial Finance Corp. and removed ITT's equipment from a bonded warehouse without paying for it. After learning of this and discovering that AG lacked sufficient funds in the bank to pay for the removed equipment and had not paid the salaries of the bonded warehouseman and its own employees or the fees of the bonded warehouse company, ITT Commercial

Finance Corp. exercised its reserved right to provide no further wholesale financing to AG and requested payment for its equipment. AG, according to defendants, refused to pay its indebtedness to ITT Commercial Finance Corp. Defendants contend that plaintiff Broyles, a shareholder in AG, changed the locks on the bonded warehouse, locking o ut the bonded warehouseman and ITT Commercial Finance Corp. AG, however, subsequently agreed to return ITT Commercial Finance Corp's equipment to it voluntarily, and, according to defendants, did so. At this point, defendants say, AG still owed ITT Commercial Finance Corp. over $1 million. When ITT requested payment, plaintiffs, who included a number of owner-operators and shareholders in AG, brought this lawsuit.

AG was not a plaintiff in the lawsuit filed in state court on March 11, 1986. Instead, a group of shareholders in AG, referred to by plaintiffs as the Teletypeset plaintiffs," together with some of the owner-operators ("Owner-operator plaintiffs") and employees either of the Teletypeset plaintiffs (according to plaintiffs) or AG (according to defendants) ("Employee plaintiffs") brought the action. All of the 156 plaintiffs were California residents. As

defendants, plaintiffs named ITT Corporation, ITT Commercial Finance Corp., a number of other ITT entities, nine individual named defendants, and "Does 1 through 50." Among the nine named defendants were Tom Green and Barbara Bookwalter, residents of California. All of the other defendants (aside from the Does) were citizens of states other than California. Plaintiffs have never specified the identity of state of residence of any of the Doe defendants.

On April 10, 1986 defendants filed a Verified Petition for Removal.[1] In their petition they argued, first, that there was complete diversity between the

[1]28 U.S.C. section 1441 (1982) provides, in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

*See also infra* Part III B(1)(b) (discussing 1988 amendment to 28 U.S.C. section 1441).

parties notwithstanding the California residence of Green and Bookwalter because those two persons had been joined "fraudulently and improperly" by plaintiffs for the sole purpose of attempting to avoid removal of the case to federal court. According to defendants, plaintiffs had failed to state, and could not state, a claim against Green and Bookwalter upon which relief could be granted.[2] Second, defendants argued that "Does 1 through 50" were "merely formal and phantom parties.... [T]he allegations with respect to them are sham and cannot affect the jurisdiction of [the district] Court or defeat the removal of this action to [the district] Court."

After the case was removed to the district court, plaintiffs moved to remand it back to state court under

[2]Defendants stated:

> Neither Barbara Bookwalter nor Tom Green made any decision to refuse "to provide any further financing for purchases of said package [of typesetting products and services]" or to remove "all of their [ITT's] computers from the inventory of the Teletypeset plaintiffs" as alleged by plaintiffs in their Complaint (paragraph 30). Neither Barbara Bookwalter nor Tom Green had any involvement in, or responsibility for, the provision of financing for purchases of the package or the termination of such financing; such financing was provided by ITT Commercial Finance Corp. through its Fast Forward Leasing Division (of which neither Barbara Bookwalter nor Tom Green was or is an employee) out of Clayton, Missouri.

28 U.S.C. section 1447(c).[3] In their motion plaintiffs argued that the case had been improvidently removed because "diversity of citizenship does not exist as two of the defendants [Bookwalter and Green] are citizens of the State of California." Plaintiffs did not deny defendants' averment that the Doe defendants were "shams."

After a hearing, the district court denied plaintiffs' motion for remand in an order dated April 23, 1986. The order denied plaintiffs' application for remand, and then dismissed plaintiffs' complaint against Bookwalter and Green because "[t]he joinder of defendants Barbara Bookwalter and Tom Green [has] been found to have been not justified on the face of the pleadings."[4] The order went on to invite plaintiffs to file a motion for reconsideration or an amended complaint, or both.

[3]Section 1447(c) states:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case....

[4]The order was itself submitted as a Proposed Order by defendants, and Judge Letts signed it after making certain alterations in the document. One of these changes was the court's substitution of the phrase "not justified on the face of the pleadings" for the word "fraudulent," which defendants had proposed.

On April 29, 1986 plaintiffs filed a motion for reconsideration of the order denying their motion to remand, to which they attached as an exhibit a "Proposed First Amended Complaint" which, they said, they planned to file in state court if the case was remanded. According to plaintiffs, they did not file this Proposed First Amended Complaint with the district court because they did not want to "concede jurisdiction of the federal court...." Appellants' Opening Brief at 3. The Proposed First Amended Complaint listed Does 1 through 50 among the defendants.

On June 3, 1986 the district court denied the motion for reconsideration. The court stated:

> The Court finds no basis for reconsidering its prior ruling that the conclusory allegations in the original complaint were insufficient to sustain the joinder of the individual defendants, and that therefore diversity jurisdiction exists in this case.

The district court refused to certify its ruling on the motion for remand for interlocutory review, and further refused to certify it as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure.

Plaintiffs nonetheless sought review of the order denying remand in this court. They also sought an emergency stay of proceedings in the district court. This court dismissed the attempted appeal for lack of jurisdiction and denied the emergency motion.

After defendants had filed motions to dismiss and for summary judgment, the district court on August 15, 1986 dismissed plaintiffs' complaint pursuant to Rules 37(b) and (d) and 41(b) of the Federal Rules of Civil Procedure. The court also entered default against plaintiffs on ITT Commercial Finance Corp.'s counterclaims. On October 16, 1986 the district court entered separate orders dismissing the complaint on grounds independent of the August 15 dismissal. The court granted defendants' motions to dismiss and for summary judgment. The court also entered judgment for ITT Commercial Finance Corp. on its counterclaims. Finally, the court entered a finding that plaintiffs had violated Rule 11 of the Federal Rules of Civil Procedure because their complaint "was not well grounded in fact and was not warranted by

existing law or a good faith argument for the extension, modification, or reversal of existing law."[5]

On November 10, 1986, plaintiffs filed their notice of appeal, which stated: "Plaintiffs and Appellants hereby appeal to the United States Court of Appeals for the Ninth Circuit all judgments and Orders entered in this case on October 16, 1986."

In this appeal, plaintiffs argue, first, that the presence of the Doe defendants destroys diversity of citizenship and requires that the panel order the case remanded to state court. Second, they argue that Tom Green and Barbara Bookwalter were properly named as defendants and, as citizens of California, also destroy diversity of citizenship. Plaintiffs thus ask this court to reverse the district court's judgments on the ground that it lacked jurisdiction over the case.

Defendants, in response, argue, first, that this court lacks jurisdiction over the issues plaintiffs seek to raise, because plaintiffs did not, in their notice of appeal,

[5]The district court does not appear, however, to have entered a final judgment imposing Rule 11 sanctions upon plaintiffs. In its October 16, 1986 order, the court "expressly deferred decision on, and retained jurisdiction of, the following matters: ...a. The imposition of sanctions on plaintiffs' counsel and plaintiffs pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. section 1927; b. The imposition of sanctions against plaintiffs' counsel and plaintiffs pursuant to Fed.R.Civ.P. 37(a), (b) and (d)...."

state that they were appealing from the district court's April 23, 1986 order denying plaintiffs' motion for remand and dismissing defendants Bookwalter and Green. Second, defendants argue that even if this court has jurisdiction over the issues plaintiffs raise, the court should affirm the district court's holding that diversity of citizenship justifying removal existed, because Bookwalter, Green and the Doe defendants were fraudulently joined and because Congress has recently enacted a statute which directs federal courts to disregard "Doe" defendants for purposes of removal.

## II. STANDARD OF REVIEW

In reviewing decisions of the district court, the court of appeals may affirm on any ground finding support in the record. *Smith v. Block*, 784 F.2d 993, 996 n. 4 (9th Cir. 1986).

"An involuntary dismissal pursuant to Fed.R.Civ.P. 41(b) is viewed as a 'judgment in defendant's favor following a trial to the court.'" *Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986) (quoting *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), *cert. denied*, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984)). Findings of fact are reviewed under the clearly

erroneous standard; questions of law are reviewed de novo. *Id.*

A grant of summary judgment is reviewed de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

A dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12 is a ruling on a question of law and as such is reviewed de novo. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). Review is limited to the contents of the complaint. *Id.*

The existence of subject matter jurisdiction presents a question of law reviewed de novo by the court of appeals. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986). A district court's factual findings on jurisdictional issues must be accepted unless they are clearly erroneous. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

Removal of a case from state to federal court is a question of federal subject matter jurisdiction which is reviewed de novo. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 930 (9th Cir. 1986), *aff'd*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

## III. DISCUSSION

### A. This Court's Jurisdiction: The Notice of Appeal

Defendants argue that because plaintiffs' notice of appeal refers only to the district court's orders of October 16, 1986, which dismissed plaintiffs' action and entered judgment on defendants' counterclaims, plaintiffs are barred from contesting in this appeal the district court's earlier denial of their motion to remand the case to state court.

Defendants point to Rule 3(c) of the Federal Rules of Appellate Procedure, which states:

> *Content of the notice of appeal.* The notice of appeal shall ... designate the judgment, order or part thereof appealed from....

Fed.R.App.P. 3(c). According to defendants, this court lacks jurisdiction over anything not designated in the notice of appeal.

As support for this proposition, defendants rely on *Hasbro Industries, Inc. v. M/S "St. Constantine"*, 705 F.2d 339, 343 (9th Cir.), *cert. denied*, 464 U.S. 1013, 104 S.Ct. 537, 78 L.Ed.2d 717 (1983), in which this court stated that appellants "[are] required to file their appeal on all issues of which they wish[ ] review within 30 days of entry of the district court's final judgment...."



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Because appellants in that case brought, in addition to a timely appeal, a separate appeal after the 30-day limit imposed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure, the *Hasbro* court refused to consider the issues raised in the latter appeal along with the issues raised n appellants' timely appeal. Defendants argue that *Hasbro* applies to this case, and dictates that if an order is omitted from the notice of appeal, appeal has not been preserved of the issues the order raises.

*Hasbro*, however, can be distinguished from the present case on at least two grounds. First, *Hasbro* does not discuss the notice of appeal and what it must contain in order to raise an issue for appellate review. Rather, the issue in *Hasbro* was whether the 30-day period for appeal ran from the time the district court entered judgment, or from the time appellees filed their cross-appeal. 705 F.2d at 343. The court held that the filing of a cross-appeal does not enlarge the time for appeal. *Id.*

Second, in *Hasbro* the appellants apparently did not intend to raise in their original appeal the issue (prejudgment interest) they later attempted to raise. By contrast, in the present case appellants' counsel

apparently believed that he was raising the removal issue in his notice of appeal.

Defendants also cite *Cole v. Tuttle*, 540 F.2d 206 (5th Cir. 1976), to support their position. In *Cole*, the Fifth Circuit held that appellants could not appeal the district court's 1973 order dismissing two defendants from the action because appellants' 1975 notices of appeal did not mention the 1973 order. As in the present case, the 1973 order in *Cole* was not an appealable order until the litigation ended, in 1975 in *Cole*. *Id.* at 207. In November of 1975, appellants filed two notices of appeal, both of which referred to the district court's orders of October 1975, which denied appellants' request for injunctive relief and refused to grant them attorney fees. *Id.* The *Cole* court refused to review the district court's 1973 order, stating that "appellants never gave notice that they were appealing the ... 1973 dismissal." *Id.* The Fifth Circuit appeared to rest its holding in part on the lack of notice to the two previously dismissed defendants whose dismissal appellants were seeking to appeal. The court stated: "The sole notices given to anyone specified that the appeal was from other orders only, entered long after these [two defendants] had departed the case." *Id.* The court concluded its discussion,

however, by citing Rule 3(c)'s requirement that a notice of appeal designate the "judgment, order or part thereof appealed from," thus ultimately resting its holding on an interpretation of the rule barring review of any order not specifically mentioned in the notice of appeal. *Id.*

Notwithstanding *Hasbro* and *Cole*, a number of this court's opinions clearly refute defendant's argument that appellants must name in their notice of appeal any order issued prior to a final judgment of which they desire appellate review. In *Lynn v. Sheet Metal Workers' Intn'l Ass'n*, 804 F.2d 1472 (9th Cir. 1986), *aff'd*, -- U.S. --, 109 S.Ct. 639, 102 L.Ed.2d 700 (1989), we stated:

> While some circuits construe Rule 3(c) strictly, *see, e.g., Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1373-75 (11th Cir.), *cert. denied.*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983) (court will hear appeal of summary judgment, but not appeal of order to vacate injunction); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981) (court will consider only denial of motion for new trial and not denial

> of request for attorney's fees), this circuit has held that "a mistake in designating the judgment appealed from should not bar appeal so long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983), *cert denied*, 464 U.S. 1071, 104 S.Ct. 981, 79 L.Ed.2d 217 (1984); *see also Munoz v. Small Business Administration*, 644 F.2d 1361, 1364 (9th Cir. 1981); *United States v. Walker*, 601 F.2d 1051, 1057-58 (9th Cir. 1979). In determining whether "intent" and "prejudice" are present, we apply a two-part test: first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue.

*Id.* at 1481. *See also Pope v. Savings Bank of Puget Sound*, 850 F.2d 1345, 1347 (9th Cir. 1988); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1516 n. 1 (9th Cir. 1987).

In the present case, plaintiffs mistakenly designated the district court's orders of October 16,

1986 as the orders appealed from.[6] It is clear, however, that defendants had "notice of the issue[s] on appeal" and "an opportunity to fully brief the issue[s]." *Lynn*, 804 F.2d at 1481. Defendants were fully aware that plaintiffs intended to argue that the district court had erred in denying their motion to remand; defendants knew that plaintiffs would contend that the naming of Bookwalter and Green and the "Doe" defendants defeated diversity jurisdiction and thus precluded removal. Defendants' appellate brief, moreover, thoroughly presents defendants' position on these issues. Thus defendants' contention that this court lacks jurisdiction to review the district court's denial of plaintiffs' remand motion is without merit.[7]

[6]It is possible that plaintiffs' counsel, recalling that the district court had tentatively ruled that there was no appeal as of right from the denial of the motion to remand, believed that he was not required, or not permitted, to mention the order denying remand in his notice of appeal. Alternatively, counsel may have read Rule 3(c) to provide that a notice of appeal may only refer to *one* "judgment, order or part thereof." Finally, it is possible that plaintiffs' counsel believed, erroneously, that he could not mention the April 23, 1986 order in his notice of appeal because more than 30 days had passed since the date of that order. *See* Rule 4(a)(1), Federal Rules of Appellate Procedure.

[7]The above discussion also demonstrates the lack of merit in defendants' argument that because plaintiffs did not specifically appeal from the district court's August 15, 1986 order dismissing the case, they may not contest dismissal on appeal.

B. Removal

(1) The "Doe" Defendants

(a) *Bryant v. Ford Motor*

Plaintiffs contend that the naming of "Doe" defendants in their complaint destroyed diversity of citizenship and deprived the district court of jurisdiction to hear the case. They argue that the district court should therefore have granted their motion to remand the case to state court.

Plaintiffs rely on this court's opinion in *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir. 1987) (as amended April 15, 1988) (en banc), *cert. vacated*, -- U.S. --, 109 S.Ct. 542, 102 L.Ed.2d 572 (1988). In *Bryant*, we held that "the presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal." *Id.* at 605. We stated that under the new rule "district courts will no longer have to make the near-impossible determination of when allegations against Doe defendants are 'specific' enough to defeat diversity." *Id.* "Instead, the 30-day limit for removal contained in 28 U.S.C. section 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court. *Id.*

(footnote omitted). We specified that our holding was to apply retroactively, requiring federal courts to remand pending cases containing allegations against unnamed Doe defendants to state court "unless both parties agree to dismiss the Doe defendants." *Id.* at 606 n. 7. Plaintiffs argue that under *Bryant* we must remand this case, which was pending when *Bryant* was decided, because plaintiffs had alleged tortious acts carried out by Doe defendants, and because the Doe defendants had been neither named, abandoned, nor dismissed by the district court.

Defendants, in response, argue that *Bryant* does not govern this case.[8] They point out that following *Bryant*, this court created two exceptions to the rule that the presence of Doe defendants precludes removal. In *Brandchaft v. E.F. Hutton & Co.*, 841 F.2d

[8]As discussed in the text, defendants argued in their appellate brief that *Bryant* was distinguishable from the present case, which was instead governed, they contended, by later Ninth Circuit cases creating exceptions to *Bryant*. *See* Part III B(1)(a). While this case was pending, however, Congress enacted a law whose effect was to overrule *Bryant*. *See infra* Part III B(1)(b) (discussing 1988 amendment to 28 U.S.C. section 1441). Defendants drew this court's attention to this enactment pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. Defendants thus ultimately base their contention that the district court correctly refused to remand the case on two grounds: first, that *Bryant* is distinguishable and, second, that the 1988 amendment to 28 U.S.C. section 1441 has retrospective application and thus governs this case. We address both of these issues.

886 (9th Cir. 1988), we decided that "*Bryant* does not require remand in cases where 'Doe' defendants were stricken by the district court prior to the November 6, 1987 decision in *Bryant*." In *Johnson v. Mutual Benefit Life Ins. Co.*, 847 F.2d 600, 602 (9th Cir. 1988), we extended *Brandchaft* to cover cases in which the district court ruled that the Doe defendants were shams before *Bryant* was decided. *See also Bogan v. Keene Corp.*, 852 F.2d 1238, 1240 (9th Cir. 1988) ("[t]he district court declared that the Doe defendants ... were shams before *Bryant* ... was decided."). Thus a finding that the Doe defendants were shams precludes the necessity for remand. *See id.*

Defendants argue that this latter exception to *Bryant* defeats plaintiffs' contention that the presence of Doe defendants in their complaint defeats diversity. Defendants however are unable to point to any order or statement by the district court which amounts to a finding that the Does named by plaintiffs were fraudulently joined, or which specifically dismisses the Doe defendants.[9] Defendants merely argue that the

[9]Defendants cite the district court's April 23, 1986 order for the proposition that "the joinder of Doe defendants had been challenged and adjudicated on the basis of fraudulent joinder...." Brief of Defendants-Appellees at 44. In fact, in its order of April 23, 1986, the district court only dismissed Green and

district court must have agreed with defendants because it denied plaintiffs' motion to remand.[10]

(b) *Section 1016(a)*

On November 19, 1988, while this case was pending before this court, the President signed into law the Judicial Improvements and Access to Justice Act of 1988. Section 1016(a) of Title X of this Act amends 28 U.S.C. section 1441(a), *supra* note 2, by adding the following sentence:

> For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Pub.L. 100-702, section 1016(a), 102 Stat. 4642, 4669 (1988). Under section 1016(a), the naming of Doe defendants no longer defeats diversity jurisdiction.

Bookwalter as improperly joined; the court went on to extend "the time for defendants who have not yet appeared to answer or otherwise plead to plaintiffs' complaint...." The district court evidently included the "Does" among this latter group of defendants.

[10]Similarly without merit is defendants' contention that plaintiffs "agreed" to dismiss the Doe defendants by their failure to controvert defendants' allegation that the Does were shams, and defendants' argument that plaintiffs for the same reason "abandoned" the Does. Brief of Defendants-Appellees at 49. As the *Bryant* court made clear, "abandonment occurs only in two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." *Bryant*, 844 F.2d at 606 n. 5.

Congress, however, did not specify an "effective date" for section 1016(a). The question whether Congress intended the provision to have retroactive application is one of first impression in this circuit. Because section 1016(a) was enacted after plaintiffs filed their notice of appeal, we must decide whether it applies retroactively in this case.

In *In re Rubin*, 769 F.2d 611 (9th Cir. 1985), we stated:

> Absent manifest injustice or congressional intent to the contrary, we generally apply the law as it exists when we render our decision.... This rule applies to changes in the law that affect jurisdiction.

*Id.* at 614 (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *In re Reynolds*, 726 F.2d 1420 (9th Cir. 1984); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 608 n. 6, 98 S.Ct. 2002, 2005 n. 6, 56 L.Ed.2d 570 (1978); *Carlton v. Baww, Inc.*, 751 F.2d 781, 787 & n. 6 (5th Cir. 1885)).[11] Applying section 1016(a)

[11]The *Rubin* court however concluded that the statutory change at issue, an amendment of the Bankruptcy Code, did not impose "jurisdictional requirements" and that therefore the rule stated above did not apply. 769 F.2d at 614. In the present case, however, section 1016(a) is "jurisdictional," because it concerns "a court's

retroactively will not create a "manifest injustice." Nor is there clear "congressional intent to the contrary," given the omission of an "effective date" or any reference to retroactivity in the legislative history. *See* Congressional Record, S 16308 (October 14, 1988). There thus appears to be no reason not to apply section 1016(a) to this case.

Plaintiffs, however, argue that because portions of the Judicial Improvements and Access to Justice Act other than section 1016(a) contain "effective dates" which would render them inapplicable to this case, Congress must have intended section 1016(a) to have a similar effective date, and to apply only to actions commenced in, or removed to, a district court 180 days after the Act's enactment. This contention is not persuasive. The absence of any specific reference to effective date in section 1016(a), together with such references in other provisions, could just as easily be interpreted to mean that congress intended section 1016(a) to take effect immediately. Clearly Congress knew how to specify an effective date other than the date of enactment when it wished to do so.

competence to hear and determine cases of the general class to which the proceedings in question belong and the power to deal with the general subject involved in the action." *Id.*

In *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985), this court discussed the considerations involved in deciding whether a statute should be given retrospective application. A statute should receive only prospective effect, the court said, when necessary to "prevent[ ] the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.'" *Id.* at 1039 (citing *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913)). Here, giving section 1016(a) retrospective effect will not assign a quality or effect to any act which it lacked when performed. Retrospective application of section 1016(a) does not alter the way in which a court would view any of the transactions which are the subject of the lawsuit. "No conduct on the part of either party would have differed if the statute had been in effect at the time of [these transactions]." *Id.* The court in *Friel* also stated that "when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases." *Id.* (citations omitted). In the instant case, section 1016(a) is a procedural enactment which does not alter substantive rights.

Therefore, the considerations militating against retrospective application are not present in this case.

We hold, therefore, that section 1016(a) took effect upon passage and applies to cases pending on that date. As a result, the presence of Doe defendants in plaintiffs' complaint neither defeated diversity jurisdiction nor required that the case be remanded to state court.

(2) Bookwalter and Green

The district court's determination that defendants Bookwalter and Green were improperly joined rested on the court's conclusion that "none of the individual defendants are alleged to have done anything wrongful except to cause the corporate defendants to act in an allegedly wrongful manner. The alleged wrongs of which plaintiffs complain are all corporate wrongs. Plaintiffs do not and apparently cannot allege that any of the individual defendants owed them any duty in their individual capacity, nor that they did any act in their individual capacity which violated any such duty or otherwise caused plaintiffs harm except as a result of corporate acts."

[4] Plaintiffs take issue with the district court's finding that the complaint[12] states no claims against Bookwalter or Green in their individual capacities. Plaintiffs assert that Bookwalter and Green are liable to plaintiffs as agents of the corporate defendants in carrying out actions which were "tortious in nature." Under California law, an agent may be liable to a

[12]In making its findings the district court evidently refused to consider the allegations made in plaintiffs' unfiled "Proposed First Amended Complaint," which plaintiffs had attached as an exhibit to their Motion for Reconsideration. In their briefs on appeal, however, plaintiffs rely on the allegations made in this unfiled "Proposed First Amended Complaint," as well those made in their original complaint, to support their contention that they have stated valid claims against Bookwalter and Green. This court will not consider the allegations contained in the unfiled "Proposed First Amended Complaint." *See* C. Wright & A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* section 3739, at 580-81 (2d ed. 1985) ("Whether an action should be remanded must be resolved by reference to the complaint at the time the petition for removal was filed."). *See also Smith v. City of Picayune*, 795 F.2d 482, 485 (5th Cir. 1986) ("Generally, the right of removal is determined by the pleadings as they stand when the petition for removal is filed."). Moreover, we see no reason to alter this approach to provide for the contingency that the amended complaint was not filed to avoid "conceding" the jurisdiction of the federal court, as the plaintiffs suggest. It is well settled that federal subject matter jurisdiction, which the plaintiffs seek to avoid, cannot be conferred by consent. *See In re Rubin*, 769 F.2d 611, 614 n. 3 (9th Cir. 1985) ("parties cannot confer subject matter jurisdiction on a federal court by their consent"); *see also Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1374 (9th Cir. 1987) (rejecting consent as a basis for federal removal jurisdiction over action filed in state court, where plaintiffs also filed an action in federal court, to which the state action claims could have been joined.) We therefore confine our review to the facts alleged in the original complaint.

third party if in the course of his agency he commits acts which are "wrongful in their nature." Cal.Civ.Code section 2343. Plaintiffs argue that Bookwalter and Green tortiously removed the inventory from plaintiffs' warehouse. The allegation in their complaint concerning the removal of inventory states that "defendants and each of them, suddenly, without warning and without any legal justification whatsoever, refused to provide any further financing for purchases of said [typesetting] package, removed all of their computers from the inventory of the Teletypeset plaintiffs, and interfered with, and totally prevented, the sale by the Teletypeset plaintiffs of any further packages."[13] This allegation, according to plaintiffs, is sufficient to join Bookwalter and Green as defendants. Because Bookwalter and Green are California citizens, plaintiffs maintain, their joinder defeated diversity jurisdiction, and the district court should have remanded the action to state court.

[13]The complaint also alleges that Bookwalter and Greene, along with other defendants, "authorized, ratified and directly made" misrepresentations to plaintiffs concerning the transactions "with the intention on the part of defendants and each of them of thereby depriving the plaintiffs of property or legal rights or otherwise causing injury." Plaintiffs frame the remaining claims against "defendants and each of them" in similar terms.

In response, defendants argue that Bookwalter and Green were fraudulently joined because, first, plaintiffs' complaint does not state a cause of action against these defendants and, second, plaintiffs are unable to state any cause of action against them. This purported inability to state a claim against Bookwalter and Green, in turn, results from what defendants contend is plaintiffs' lack of standing. According to defendants, the agreements which plaintiffs allege defendants fraudulently induced, interfered with, and wrongfully terminated were entered into not by the Teletypeset plaintiffs or any other named plaintiffs but rather by American Graphics (AG), which is not a plaintiff in this action. Because the Teletypeset plaintiffs are merely shareholders of AG, and because none of the plaintiffs were parties to any of the alleged agreements, they have no standing, defendants argue, to sue for fraudulent inducement, interference with, or wrongful termination of business relationship. Moreover, because the inventory allegedly taken by Bookwalter and Green was in AG's possession at the time of its removal, plaintiffs lack standing to sue Bookwalter and Green for any injury arising out of that incident.

Defendants are correct that plaintiffs cannot prevail on any claims they seek to bring against the defendants, including Bookwalter and Green, because plaintiffs were not parties to the alleged agreements. Plaintiffs have conceded that they were not parties to the relevant transactions. In their opening brief, plaintiffs state:

> Prior to January 1, 1985, the named corporate defendants, with the express knowledge and consent of the remaining defendants and each of them, entered into *a written and oral arrangement with TEL and AG*, wherein TEL and AG were made official dealers authorized to sell ITT products and services to the general public on behalf of all the defendants. The principal operation, which was the subject of said arrangement, consisted of an agreement on the part of said defendants to set up TEL and AG to provide ... financing ... for the sale to the general public of a package of typesetting products and services.

Appellants' Opening Brief at 3-4 (emphasis added).

Copies of a Dealers Agreement, Purchase Agreement, Security Agreement, and leases all show AG, and none of the named plaintiffs, as a contracting

party. Thus it appears that none of the plaintiffs were personally involved in any of the transactions in question. This lack of involvement deprives plaintiffs of standing to sue defendants, for none of the torts plaintiffs allege could have been committed against any entity other than AG. The plaintiffs may have suffered financial losses stemming from their participation in the typesetting venture as shareholders, employees, or customers of AG, but they cannot allege injury to *themselves* by reason of alleged wrongdoing by defendants in the entering, execution or termination of the underlying agreements to which plaintiffs were not parties. To put it another way, a favorable decision by this court would not help plaintiffs because the torts they allege were committed not against them but against AG, and only AG could recover for such torts.

In conclusion, the named plaintiffs are unable to state a claim against defendants for any of the wrongs alleged in their complaint. As a result, defendants Green and Bookwalter were properly dismissed by the district court.

AFFIRMED.

# APPENDIX B

B1

FILED

JAN 30 1990

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
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| LYNDA KRUSO, GLORIA YOKUBAITS, KATHY E. ACQUITAPACE, CHRISTINE M. FORAKIS, et al., | ) | No. 86-6670 |
| | ) | D.C. No. CV 86-2285 JSL |
| Plaintiffs-Counterdefendants-Appellants | ) | ORDER |
| vs. | ) | |
| INTERNATIONAL TELEPHONE & TELEGRAPH CORP., ITT COMMERCIAL FINANCE CORP., ITT INDUSTRIAL CREDIT CO., a corporation, ITT BUSINESS COMMUNICATIONS, et al., | ) | |
| Defendants-Counterdefendants-Appellees. | ) | |

Before: FLETCHER, PREGERSON and LEAVY, Circuit Judges

Appellants' petition for rehearing is denied. Appellees' motion to substitute a personal representative for a deceased party is also denied.

APPENDIX B

# APPENDIX C

C1 FILED

MAR 26 1990

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| LYNDA KRUSO, GLORIA YOKUBAITIS, KATHY E. ACQUITAPACE, CHRISTINE M. FORAKIS, et al., | ) | No. 86-6670 |
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| Plaintiffs-Counterdefendants-Appellants | ) | ORDER |
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| INTERNATIONAL TELEPHONE & TELEGRAPH CORP., ITT COMMERCIAL FINANCE CORP., ITT INDUSTRIAL CREDIT CO., a corporation, ITT BUSINESS COMMUNICATIONS, et al., | ) | |
| Defendants-Counterdefendants-Appellees. | ) | |

Before: FLETCHER, PREGERSON and LEAVY, Circuit Judges

Appellants' motion for stay of the mandate of this Court pending application to the Supreme Court for writ of certiorari is granted. The mandate shall be stayed through April 30, 1990.

APPENDIX C

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1684

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

LYNDA KRUSO, et al.,
*Petitioners,*

vs.

ITT CORPORATION, et al.,
*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# No. 89-1684

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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LYNDA KRUSO, et al.,
*Petitioners,*

vs.

ITT CORPORATION, et al.,
*Respondents.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners request the Court to grant certiorari in this case on the ground that the statutory procedure for removal of cases from federal court to state court (28 U.S.C. § 1446) is unconstitutional as violative of the due process clause of the Fifth Amendment to the United States Constitution. Petitioners do not contend that this litigation involves a decision conflicting with any ruling of this Court or of any other Circuit, nor do they assert that there has been any decision by the lower court calling for exercise of this Court's supervisory power (Supreme Court Rule 10.1(a)). Rather, and then by only footnote reference (petition, p. 6, n. 2), petitioners request the Court to consider certiorari based upon partial quotation of Supreme Court

Rule 10.1(c), claiming that their "petition presents 'an important question of federal law, which has not been, but should be settled by this Court.' " Petitioners, of course, leave out the condition precedent specified in Rule 10.1(c) — a *decision* on that "important question" by a lower court in this litigation ("*When a state court or a federal court of appeals has decided* an important question of federal law which has not been, but should be, settled by this Court. . . ."; petitioners' omission emphasized). In this litigation, no lower court has ruled on the question petitioners pose for certiorari; indeed, petitioners have never even raised it before. Moreover, petitioners cite no case whatsoever wherein the constitutionality of the removal procedure has ever been questioned.

## STATEMENT OF THE CASE

Petitioners filed this tort suit on March 11, 1986 in California state court. On April 10, 1986, by verified petition for removal based on diversity of citizenship jurisdiction, respondents removed the action to the United States District Court for the Central District of California.[1] On April 15, 1986, petitioners filed an "Ex Parte Application for Sua Sponte Order Remanding Removed Case to Superior Court."

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[1] Petitioners do not list all the parties to the proceeding, as required by Supreme Court Rule 24.1(b). The named defendants-respondents are ITT Corporation; ITT Commercial Finance Corporation; ITT Industrial Credit Company; ITT Business Communications Corporation; Fast Forward Leasing Division, a division of ITT Commercial Finance Corporation; Wholesale Finance Division, a division of ITT Commercial Finance Corporation; ITT Communication & Information Services, Inc.; ITT Information Systems, an unincorporated division sued erroneously as a division of ITT Communication & Information Services, Inc.; Rand V. Araskog; Bernard N. Del Bello, Jr.; Ronald L. Kozminske; C. Lamar Potts; Tom Green; Vernon Schroeder; Lori Hanson; Jeff Voegtli (sued erroneously as "Vogelti"); and Barbara Bookwalter. Pursuant to Supreme Court Rule 29.1, the Court is apprised that the only non-wholly owned subsidiary of ITT Corporation is ITT World Directories, Inc.

On April 23, 1986, after considering petitioners' application for remand and respondents' opposition and also conducting a full hearing, the district court denied the application for remand, finding that the only two named defendants (out of 17) who were of non-diverse citizenship were sham defendants added by petitioners solely to attempt to defeat federal jurisdiction.

Petitioners then filed a motion for reconsideration of the denial of their application for remand. After further consideration and hearing, the motion was denied.

In orders entered on August 15 and October 16, 1986, the district court dismissed petitioners' complaint and entered judgments against some of the petitioners on their contract indebtedness to respondent ITT Commercial Finance Corporation.[2]

On November 10, 1986, petitioners filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The *sole* question petitioners presented on appeal was whether the district court possessed diversity of citizenship jurisdiction. The appeal was taken under submission on March 9, 1989, and on April 19, 1989, the Ninth Circuit issued an opinion affirming the district court's denial of remand. Petitioners filed a petition for rehearing on May 1, 1989. On June 26, 1989, the Court of Appeals issued an amended opinion, modifying some non-substantive language in response to a petition for rehearing (to correct and modify opinion) filed by respondents (opinion published at 872 F.2d 1416). Petitioners' petition for rehearing was denied on January 30, 1990.

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[2] The court also entered findings for sanctions against petitioners and their counsel pursuant to Rules 11 and 37, Federal Rules of Civil Procedure, stating in part that petitioners' complaint "was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

Petitioners did not raise the argument that the removal procedure is unconstitutional in either the district court or the Court of Appeals. Thus, although petitioners state in their petition (p. 4, n. 1) that they "did not directly challenge the constitutionality of the removal procedure in either the District Court or the Court of Appeals," the fact is that there was no challenge at all — direct *or* indirect.

## ARGUMENT

### Summary of Argument

Petitioners' argument that the federal removal statute violates the due process clause of the Fifth Amendment to the United States Constitution should not be heard by this Court because the petition for certiorari satisfies none of this Court's stated "considerations" for grant of certiorari, the question was not raised in the court below, and petitioners' position is invalid.

The question presented should not be considered because there is no lower court decision satisfying the predicate for the Court's discretionary consideration of grant of certiorari (Supreme Court Rule 10.1(c)). In this case, also, there is no reason for the Court not to apply its ordinary rule of not considering issues which were neither raised before nor considered in the lower court.

Petitioners' argument that due process requires a hearing on a petition for removal, before the district court assumes jurisdiction, rather than on a motion to remand, after the court has jurisdiction, is logically invalid. In either event, the court has and must exercise jurisdiction to reach its decision. Moreover, a plaintiff's choice of a state forum, rather than a removing defendant's choice of a federal forum, is not a life, liberty or property right protected by the due process clause. Nevertheless, the removal statutes do provide to a plaintiff the opportunity for a hearing at a meaningful time and in a meaningful manner to object to removal, satisfying even the strictest due process review. In this case, also, respondents have had, and exercised, their full opportunity for a hearing.

The fact that petitioners can cite no case where the constitutionality of the removal procedure has been challenged is no mystery — the question petitioners seek to raise is without merit.

## I. PETITIONERS' ARGUMENT THAT THE FEDERAL REMOVAL PROCEDURE VIOLATES DUE PROCESS WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Because petitioners never raised in the court below the argument that the federal removal procedure violates due process, they should not be allowed to raise that issue for the first time in a petition for a writ of certiorari. This is doubly so in this case.

First, the discretionary "consideration" for granting certiorari invoked by petitioners (Supreme Court Rule 10.1(c)) is expressly conditioned on the entry of a *decision by a lower court* on the "important question of federal law [on which certiorari is sought] which has not been, but should be, settled by this court." Here, the essential precondition to petitioners' certiorari request — a decision by a court below on the question presented in their petition for a writ of certiorari — is absent.

Second, this Court will not ordinarily consider issues which were neither raised before nor considered by the lower court. *See, e.g., Adickes v. S.W. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As the Court has stated in dismissing a writ of certiorari as improvidently granted:

> The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here.

*Ellis v. Dixon*, 349 U.S. 458, 460, *reh'g denied*, 350 U.S. 855 (1955).

There is no reason to deviate from that general rule in this case. Here, having been unsuccessful in convincing the courts below that they lacked jurisdiction, petitioners have concocted an entirely new and frivolous argument in an eleventh-hour effort to delay enforcement of judgments long standing against them. Petitioners make no claim in their petition that their new

argument had been inadvertently overlooked nor do they advance any other reason why this Court should consider an argument never presented to the courts below during the long course of this litigation.

## II. PETITIONERS' PETITION IS WITHOUT MERIT

Petitioners seek to challenge as unconstitutional the statutory procedure for removal of a case from state court to federal court. Under that statutory scheme, removal is effectuated upon filing of a notice (formerly petition) for removal. 28 U.S.C. § 1446(a). Upon removal, "[t]he United States district court to which such petition is directed shall examine the petition promptly" and "[i]f it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal." 28 U.S.C. § 1446(c)(4). "If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require." 28 U.S.C. § 1446(c)(5). The plaintiff may file a motion to remand on the basis of any defect in the removal procedure within 30 days after the filing of the notice of removal. 28 U.S.C. § 1447(c). Further, the plaintiff may make a motion to remand if the district court lacks subject matter jurisdiction, or the court may raise the issue *sua sponte*. *Id.*

Petitioners contend that due process requires a hearing in federal court on the issue of removability *before* that court takes jurisdiction over the removed case (petition, pp. 10-11). Under petitioners' postulate, district courts would be required to hold a hearing on each and every notice or petition for removal before proceeding further with the case. Petitioners argue that "the plaintiff's right to move for remand after removal is no adequate substitute for a hearing before removal" (petition, p. 12). This is so, petitioners say, because "plaintiff must ask for

remand from a judge who has *already* taken jurisdiction of the merits of the case" and "a judge who has already become involved in the merits of the case is a far less disinterested adjudicator of the removal issue than he would be *if* he considered that issue *before* he was seised of the merits of the case" (petition, p. 12; emphasis in original).

The premise of petitioners' position is, therefore, that the district court would not have jurisdiction over the case until it granted the petition to remove.

Petitioners' premise is invalid. The district court possesses jurisdiction over the removed case upon the filing of the petition for removal. 28 U.S.C. § 1446. More fundamentally, however, the district court has jurisdiction to determine its own jurisdiction. *See, e.g., United States v. United Mine Workers,* 330 U.S. 258, 291 n. 57 (1947). "If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue." 13A Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3536 at 535. Thus, whether removal were tested on a motion by plaintiff to remand, a notice or petition by defendant to remove, or *sua sponte* by the district court, the court would possess, and must exercise, jurisdiction over the case to render its decision. Consequently, petitioners' contention that due process is violated unless a hearing is held on a defendant's notice or petition to remove rather than on a plaintiff's motion to remand because the court has jurisdiction in one situation, but not in the other, is a legal oxymoron.

Similarly flawed is petitioners' argument that a hearing must be conducted on the petition for removal because the "judge . . . has already become involved in the merits of the case" and therefore "is a far less disinterested adjudicator of the removal issue" (petition, p. 12). Contrary to petitioners' argument, however, the district court considers remand of a case either *sua sponte* or on a motion to remand at the outset of the litigation, *not* after it has become "involved in the merits." The *only* issue before the court at that time is jurisdiction.

The district court has no more "taken over jurisdiction of the case on the merits" (petition, p. 10) when the remand issue is considered than has a court when it rules upon a motion to dismiss for lack of jurisdiction. Under petitioners' logic, a defendant would never be afforded procedural due process in pursuing a motion to dismiss for lack of jurisdiction; instead, the plaintiff would be required to file a motion for leave to file a complaint and have a hearing on that motion, with notice to the contemplated defendant.

Petitioners' proclamation that a plaintiff's choice of forum "necessarily evokes the fullest protection of due process of law" under the Fifth Amendment (petition, p. 9) is likewise without legal basis. The due process clause protects against deprivations of "life, liberty or property." There is no authority that a plaintiff's choice of a state forum, instead of a federal forum with concurrent jurisdiction, is a life, liberty or property right which should be accorded procedural due process scrutiny.[3] The cases cited by petitioners are inapposite; they involve deprivation of actual, fundamental *rights,* not the mere *choice* of a desirable forum. *Boddie v. Connecticut,* 401 U.S. 371 (1971) (right of indigent citizens to access to state court, the only available forum, in order to obtain divorces); *Armstrong v. Manzo,* 380 U.S. 545 (1965) (a parent's right to notice of the pendency of adoption proceedings which could permanently terminate parental rights); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (right of welfare recipients to evidentiary hearings prior to deprivation of their welfare benefits).

In enacting the removal statutes, Congress determined that a plaintiff's initial choice of a state forum may be superseded

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[3] Petitioners also misconstrue whose "rights" are involved. While a plaintiff has a "right" to bring a lawsuit, where, as in this litigation, there is concurrent jurisdiction in state and federal court, a defendant has the "right" — granted by Congress — to remove the case from state to federal court.

under certain conditions to allow a defendant to remove the case to federal court. As this Court said more than 100 years ago, the statutes give "to the plaintiff in the first instance an election of courts before suit is brought; and where the suit was commenced in a state court a like election to the defendant afterwards." *Chicago and Northwestern Ry Co. v. Whitton,* 80 U.S. 270, 289 (1871). To characterize a plaintiff's qualified privilege to choose the initial forum for his lawsuit as a "right" on a par with, and deserving of the same due process protection as, the right to "the very means by which to live" (*Goldberg v. Kelly,* 397 U.S. at 264), or the right to access to court when that right is "the exclusive precondition to the adjustment of a fundamental human relationship" (*Boddie v. Connecticut,* 401 U.S. at 383), would distort the due process clause beyond all rational parameters.

Finally, and in any event, the removal statutes *do* provide an objecting plaintiff " 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner' * * * 'for [a] hearing appropriate to the nature of the case.' " *Boddie v. Connecticut,* 401 U.S. at 378. As summarized *supra,* filing and service of a "notice" is required for removal, and the validity of the removal is tested by initial examination of the petition by the district court[4] and by a hearing ordered by the court or on a motion to remand filed by the plaintiff. 28 U.S.C. §§ 1446(c)(4) & (c)(5), 1447(c). Indeed, the removal procedure is weighted against removal, with all of the evidentiary and procedural burdens being placed on the removing defendant, including being required to affirmatively establish federal jurisdiction and the right to remove.

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[4] Petitioners again misstate the law when they argue that the district court "totally oust[s] state jurisdiciton without even the most cursory review of the petition to determine whether the requirements for removal have been met" (petition, p. 10).

In this litigation, petitioners fully availed themselves of their "meaningful" opportunity to contest removal. Within five days after removal, petitioners filed an "Ex Parte Application for Sua Sponte Order Remanding Removed Case to Superior Court."[5] The issue was briefed and the district court held a full hearing. When the district court denied the motion for remand, petitioners filed a motion for reconsideration, which was also briefed and heard. In the district court and later in the Court of Appeals petitioners did not claim they were deprived of an opportunity to be heard or even that any arguments against removal remained unarticulated. Petitioners should not now be heard to complain that the removal procedure deprived them of any right to be heard "at a meaningful time and in a meaningful manner." This is particularly true when petitioners, throughout the entire four-year course of this litigation, have never before raised the argument that the removal procedure is violative of the due process clause.

Petitioners not only are unable to establish that a plaintiff's initial choice of a state forum is somehow a constitutionally protected "right" to which procedural due process attaches, but also are unable to show that the removal procedure deprives a plaintiff of any procedural protection. If the goal of the due process which petitioners claim is to ensure that a plaintiff is given the right to oppose removal and that no case be improperly or improvidently removed, then the removal procedure set forth in 28 U.S.C. §§ 1446 and 1447 already fully protects those interests.

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[5] Interestingly, by such "application" petitioners attempted to obtain remand without respondents having any opportunity to respond, let alone be heard.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1684

In the
# Supreme Court of the United States

October Term, 1989

LYNDA KRUSO, et al.,
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*v.*

ITT CORPORATION, et al.,
*Respondents.*

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
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## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### AS RESPONDENT'S BRIEF SUGGESTS, DUE PROCESS REQUIRES THAT PLAINTIFFS IN CIVIL CASES BE GIVEN CONSIDERATION ON REMOVAL SIMILAR TO THAT ALREADY GIVEN TO STATE PROSECUTORIAL AGENCIES.

Respondent misread the removal statute (specifically 28 U.S.C. section 1446(c)) in its brief (Respondent's Brief at 7), but did so usefully.

Respondent plausibly assumed that the language of section 1446(c)(4) and (5) applies to all removals. If it did, Petitioner here would have nothing to object to, for those subsections provide that a petition for removal is to be summarily dismissed if it appears on its face that it should not be granted (subsection (4)), and that, if it the petition is not dismissed, it should be set for an evidentiary hearing immediately (subsection 5)).

The problem is that subsection 1446(c) does not apply to all removals, it applies only to the removal of criminal cases.

But Respondent's interpretation of subsection 1446(c) as applicable here suggests that similar protection for civil plaintiffs is not entirely inconceivable. Indeed, even if hearings were not ordered in every case, it would go a long way to ensuring plaintiffs due process if the court were at least required to examine removal notices or petitions in civil cases, and plaintiffs were allowed to object to them, before they were granted.

It is Respondent, not Petitioners, who "misstate the law (Respondent's Brief at 10)." Now that Respondent has been informed that filing notice of removal does "totally oust state jurisdiction without even the most cursory review of the petition to determine whether the requirements for removal have been met (Peti-

tion, p. 10)," Respondent may wish to reconsider its assertion that the Petition is without merit.

## CONCLUSION

For the reasons stated above and in the Petition, the writ should be granted.

Respectfully submitted,

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*LYNDA KRUSO, et al.*

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am a citizen of the United States and a resident of the county aforesaid; I am employed in the office of a member of the bar of this Court at whose discretion the following service was made. I am over the age of 18 years and not a party to the within action. My business address is 1717 - 4th Street, Third Floor, Santa Monica, California 90401.

On June 9, 1990, I served the foregoing document described as PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the parties interested in this action by enclosing true copies thereof in sealed envelopes, addressed as follows, with postage thereon fully prepaid, and by depositing them in the United States Mail at Santa Monica, California:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this Ninth day of June, 1990, at Santa Monica, California.

Linda Marie Baldridge